



## Institutions of court settlement and Judicial /court-annexed mediation as part of the unified system of justice

Ana Gurieli

*Affiliated assistant of the Faculty of law of Caucasus International University, Doctor of law, Lawyer*

### ABSTRACT

In Georgia, the existence and strengthening of two important legal institutions - court settlement and court mediation may provide opportunities, in order to ensure the common goal – the satisfaction of the interests of individuals, in the civil proceedings, much faster, and with less expenses, than it can be achieved in civil process. Consequently, in the court system, highlighting their importance, may excel the unified chain of justice and ensure trust towards the judiciary.

In the paper, it is considered relevant, to describe the fact of settlement in the court with the term "court settlement" and not like "settlement", as the term "settlement" can also be considered to describe an agreement, reached by the parties, before the litigation process.

At the same time, in order to ensure the institutionalization of mediation in Georgia, it is necessary to continue attempts, not only in the direction of improving the legislation, but also to introduce and implement new mediation programs.

The implementation of the presented recommendations, as a result, may facilitate the introduction of legal institutions and the improvement of the unified chain of justice.

**KEYWORDS:** State, Dispute, Judge

### INTRODUCTION

According to Article 5, Paragraph 4 of the Constitution of Georgia, "State authority shall be exercised on the basis of the principle of separation of powers." According to this article, the principle of separation of powers is considered. However, the realization of the principle of separation of powers, should not be considered as a completed act. Its realization, will constantly maintain its actuality, because the goal it seeks, is to protect the rights of the individuals from the arbitrariness of the state. These threats and risks always exist from the state authorities. Only normative requirements and legal rules can not establish the guarantees of the limitation the government. The protection of individual rights is possible only in the society, where there exists separation of powers. Still, Article 16 of the French Declaration of Human Rights indicated, that a society where human rights are not

recognized and there is no separation of powers, has no constitution. No state body should have so much concentrated power, that it could violate this concept. Only the separation of power guarantees the protection of individual sovereignty and personal autonomy.<sup>1</sup> Therefore, in any state, there are three types of government: legislative, executive and judicial. Among them, it is the judiciary, that should most ensure the implementation of the principle of fairness, as the issue of protection of the rights of individuals in each case, is discussed here. However, what is justice? It is recognized, that this is a contradictory category and there exist completely different views. There is no exact and unambiguous scale of it. Therefore, the scale of justice is determined by the legislature. The law reflects the public consensus on justice. There exist no

1 Khubua G., 2016. Constitutional Balance of Power, Constitution of Georgia 20 Years Later, Tbilisi, p. 103-105.

idea of justice, that can be considered by the judge. The definition of the law can not be based on the abstract idea of justice. The judge should consider the scale of fairness, considered by law.<sup>2</sup>

Consequently, in this process, the role and the importance of the judiciary reveals. As it is acknowledged, the main goodness and dignity of the judiciary, is based on two values: one is its high purpose, noble goal and human request to ensure justice for men; The second is that, the mankind, yet, has not created a more democratic institution than the judiciary.<sup>3</sup>

Considering the above mentioned, it is important to determine, if the justice system provides opportunities, in order to pursue the best interests of the citizens. One of the most effective ways to achieve this, would be to evaluate the two internal institutions of the chain of justice – court settlement and court mediation institutions. In the unified system of the judicial system, an effective functioning of the mentioned institutions, significantly determines the formation and functioning of the chain of justice, which, in terms of results, affects the fate of each individual.

The successful functioning of the mentioned institutions, in the chain of informal and formal dispute resolution processes, existing in the country, is significantly determined by the existence of scientific researches, the studies of the institutes, the deficit of which is observed in the Georgian scientific space. This is becoming more relevant, taking into account the benefits, that these institutions offer to the citizens.

Considering above mentioned, the study discusses the legal significance and characteristics of the institutions of court settlement and court mediation; Their similarities and differences; The attention will be paid to the judge's authority, which is agreed to be different, with its legal or ethical underpinnings, in case of conduction of each process.

The research is realized considering general scientific – historical, as well as special – normative and comparative methods.

## JUDICIAL MEDIATION, AS A FORM OF MEDIATION

According to statistics, most civil disputes are resolved through mediation.<sup>4</sup> As for the possible forms

of mediation, there exist: court and private mediation. In addition, there exists two types of court mediation: 1. Court-annexed mediation<sup>5</sup>, Which institutionally coordinates with the court, but is procedurally completely independent, as a separate institution;<sup>6</sup> 2. Judicial mediation<sup>7</sup>, which is related to the court, in terms of the building and the staff. In a similar form of mediation, the mediator may be the acting judge.<sup>8</sup>

For the purposes of the paper, for example, the Canadian experience is considered to be relevant, as this state, is one of the leading, in functioning the forms of court mediation. In particular, both forms of court mediation is used in Canada – court-annexed and judicial.<sup>9</sup>

It is also important to highlight the experience of the United States and the programs, that have been successfully implemented, as, with a recognized approach, in this state, the specifics of regulating mediation, meets all the standards and prerequisites for being evaluated to be successful.<sup>10</sup> The U.S. experience in introducing forms of mediation is diverse. Among them, the successful practice of judicial mediation is used. For example, in the state of California, on January 22, 1979, a special degree of court overcrowding has been observed. Considering this, it has been decided, that the judges should have conducted negotiation procedures. At the time, no one knew, what the outcome of the decision might have been. Eventually, it turned out, that by November 21, 1979, the court was no longer overcrowded; And for the six hundred and fourteen cases, that have been discussed during ten months, in case of standard court hearings, their resolution was likely to last four years. Consequently, the researchers conclude, that the idea, that judges should not spend time mediating, because their resources are needed only to conduct court hearings, is incorrect. Judge's time should also

2 Khubua G., 2015. Theory of Law, Tbilisi, p. 205.

3 Ugrekhelidze M., 2017. Journal Law and the World № 7, Tbilisi, p. 42.

4 Melnick J., Lost Opportunities in Mediation, Westlaw Journal Securities Litigation and Regulation, Vol. 19, issue 4, 2013, p. 1.

5 Steffek F., 2012. Mediation, in The Max Planck Encyclopedia of European Private Law, Vol. II, Basedow J., Hopt J.K., Zimmermann R., Stier A., Oxford University Press, Oxford, p. 1163.

6 Lindblom H., 2017. Progressive Procedure, Iustus, p. 422.

7 Brunet E., 2002. Judicial mediation and signaling, Nevada law journal, p. 232.

8 Steffek F., 2013. Mediation und Güterichterverfahren, Zeitschrift für Europäisches Privatrecht, (ZEuP) #3, Verlag C.H.Beck, München, p. 538. Also see: Khandashvili I., 2018. Court and Non-Judicial Forms of Alternative Dispute Resolution on the Example of Mediation in Georgia, Ivane Javakhishvili Tbilisi State University, Faculty of Law, Tbilisi, p. 184.

9 Richler J., 2011. Court-Based Mediation in Canada, Judges' Journal, p. 14.

10 Munroe C., 1996. Court-Based Mediation in Family Law Disputes: An Effectiveness Rating and Recommendations for Change, Probate Law Journal, Issues 2-3, p. 132.

be spent on mediation. As the researchers point out, more judges and more courtrooms may not be the solution to the problem, as these resources cost very expensive for taxpayers. The solution method can be – more, more and more mediation.<sup>11</sup>

The experience of China is also interesting – except of court-annexed mediation, judicial mediation is also popular there, when the judge leads the court mediation process. This is allowed under the Code of Civil Procedure of 1991. The degree of its success is also shown by the practice – from 1978 to 2004, about 72.2 million cases were considered by the courts, of which, 36.42 million were successfully completed using judicial mediation. Judicial mediation in China, also plays an important role in achieving social stability.<sup>12</sup>

In Georgia, in terms of the development of mediation, and in particular, court mediation, given its importance, the fact of the adoption of the Law on Mediation should be mentioned, which can be defined as an attempt to bring the institution closer to democratic values. The Law Working Group was established with the technical support of the UNDP Georgia Office and Employed the specialists, who drafted the law, which was sent to the Ministry of Justice of Georgia. According to the law on mediation, the possibility of explaining the terms of mediation, mediator and other concepts related to the institute of mediation is considered; The principles of mediation and the rule of choosing/appointing a mediator has been established; The terms have been to be considered, when selecting him/her; The rules for remuneration of the mediator has been established; Introduction of court and private mediation forms has been considered, during which, the final result of the process – mediation settlement will be subject to enforcement by the court, that meets the standards of the European Mediation Directive. The issue of the existence of the Georgian Association of Mediators in the form of a legal entity, has also been considered; Following the amendments to the Civil Procedure Code of Georgia, according to which mediation was first considered at the legislative level, this may be assessed as the first attempt of Georgian legislation, to start the process of institutionalization of mediation. Consequently, even after its enactment, it is necessary to continue working, in order to ensure the regulation of fundamental issues related to the institute, with the active involvement of the courts and judges in the process.

11 Rich E., 1980. An Experiment with Judicial Mediation Personal, American Bar Association Journal 6, p. 530.

12 Liming W., 2009. Characteristics of China's Judicial Mediation System, Asia Pacific Law Review, p. 67-68.

## THE CONCEPT OF SETTLEMENT AND ITS LEGAL SIGNIFICANCE

Alike mediation, the institution of settlement should be assessed as one of the most effective means of coping with conflicts in public relations and resolving them peacefully. The process of settlement offers the judiciary and the judge many positive results. The settlement is the basis for the termination of the court proceedings. The settlement saves the judge's time, as they only have to consider the cases, that cannot be settled.<sup>13</sup>

That is why, for example, in Australia, the role of the judge in the civil litigation process has changed significantly in recent years. As many theorists and practitioners have pointed out, the modern judge should not be identical to the judge of the 20th century. The judge of the 21st century, should have information about "managerial organization". He should be interested, how the process will end and be familiar with "therapeutic jurisprudence". In modern society, the neutral, passive role of the judge has been replaced by an active judge, focused on resolving the case and reaching an enforceable settlement.<sup>14</sup>

The discussion of the American judges, also shows, that settlements are reached in the court, because the complete majority of the parties want to reach a settlement. This is usually due to their personal desire, to avoid the negative consequences of litigation. They argue, that it is possible to mention numerous cases in which court costs, time factor and inconvenience have not become the main basis for settlement. The point is that, as creatures, humans are cognitive, social, and communicative. The trial, in all respects, can be painful and trying to avoid it, can be assessed is natural.<sup>15</sup> Fully, during the life, we are constantly engaged in negotiations, or making compromises.<sup>16</sup> In the United States, a judge's settlement attempts are considered to be a so-called part of pre-trial management. This concept reflects the managerial role of judges.<sup>17</sup>

Legal relations are complex and diverse. People negotiate, make deals, arrange business meetings,

13 Lawrence F.,Wall James A., 1981. Judicial Settlement Techniques Schiller, American Journal of Trial Advocacy, p. 40.

14 Sourdin T., 2011. Five Reasons Why Judges Should Conduct Settlement Conferences Non-Adversarial Justice, Monash University Law Review, p. 145-146.

15 Zampano R., 1995. Settlement Strategies for Trial Judges From the Bench, Litigation 22 Litig journal, p. 3.

16 Zampano R., 1995. Settlement Strategies for Trial Judges From the Bench Litigation 22 Litig journal, p. 4.

17 Deason E., 2017. Beyond Managerial Judges: Appropriate Roles in Settlement, Ohio State Law Journal, p. 73.

when there is no “real” legal relationship, but only legal regulation of public relations.<sup>18</sup> In this process, there are often threats related to the non-fulfillment of obligations by the parties, as well as in some cases, the variability of their will, which may or may not, be based on the existence of changed circumstances. If the parties are not able to reach a settlement by mutual agreement, the dispute usually gets the subject of civil proceedings, at which point, they also have the opportunity, to reach a settlement during the civil procedures.

Accordingly, it is clear, that today, in the Georgian legal system, the term settlement is used with different meanings. In fact, the definition of the dual legal meaning of the term, relates to the question – of what is a settlement, a right (material), or an realization of a right (procedural).<sup>19</sup>

To clarify the issue, the meaning of the term in substantive and procedural law has to be mentioned. The material significance of the concept of settlement is that, the Civil Code of Georgia defines the rules of conduct for public relations participants at the stage, when the relationship has not yet been the subject of court proceedings.<sup>20</sup> So, The term “settlement” may become relevant in the period, before the court proceedings start.

As for the essence of the settlement, according to the Civil Procedure Code of Georgia, in this case, for the first time, the use of the term “settlement” is related to the principle of disposition. The concept of settlement, in the The civil procedure code of Georgia, is mentioned many times. However, only Article 218 of the code expresses the essence of the settlement and, consequently, presents the purpose of the legislator.

As a result of the analysis of the issue, it is clear, that the term settlement in the Civil Procedure Code of Georgia, in its essence, means reaching the settlement, after a lawsuit has been filled in the court, in accordance with the procedural legislation of Georgia and does not imply the possibility of settlement during the ordinary relations of the parties. So, the essence of this process, can be fully described by the term “court settlement”. Therefore, in terms of the terminological perfection of the legislation, it would be appropriate to establish this term, to describe a process, that in-

volves resolving a dispute in the civil proceedings and not the disputes, which are not discussed in the court. If the recommendation will be taken into account, in terms of terminological definition of the issue, there may be seen the similarity with the institution of mediation – as, if the mediation takes place in the court system, it is court-annexed or judicial mediation.

## CONCEPTUAL DIFFERENCES BETWEEN THE ROLES OF A JUDGE AND A MEDIATOR DURING THE COURT SETTLEMENT AND COURT MEDIATION PROCESSES

In some cases, questions may be asked about the conceptual similarity of court settlement and mediation processes. Given the specifics of the institute, it is clear, that a judge may also be involved in the process of drafting a court settlement. Such “involvement” is not only an initiative of the court, but, more often, the desire of the parties, and their representatives.<sup>21</sup> However, in reality, court mediation, in case of revealing both of its forms, with the essence and the role of mediator (mediator-judge) involved in the process, substantially differs from the court settlement. During litigation process, the parties may be influenced by specific norms, the process is less creative, while the role and importance of law in the mediation process does not bound the parties. During mediation, both parties are unlimited in their approaches, to reach an agreement that fits their best interests. The only important thing, is that these interests have to be acceptable for both parties, on which mediation resources are spent.<sup>22</sup> Consequently, the difference is very noticeable, because during the court settlement, a judge is a person with the power, to make the decision, while a mediator (judge-mediator) does not have a similar power. Even in case of judicial mediation, in accordance with the unified standarts, the same judge does not have the right to hear and resolve the same case. Therefore, in the mediation process, it is easier for the parties to express their real interests and positions before a neutral third par-

18 Bichia M., 2010. Methodological foundations of civil law relations, Law Journal №1-2, Tbilisi, p. 84.

19 Mamaishvili T., 2017. Settlement as a basis for termination of civil proceedings, Ivane Javakhishvili Tbilisi State University, Tbilisi, p. 23.

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21 Mamaishvili T., 2017. Settlement as a basis for termination of civil proceedings, Ivane Javakhishvili Tbilisi State University, Tbilisi, p. 85.

22 Trams K., 2008. Die Mediationsvereinbarung-eine vertragsrechtliche Analyse, Tectum Verlag, p. 13. See also: Khandashvili I., 2018. Judicial and non-judicial forms of alternative dispute resolution on the example of mediation in Georgia, Ivane Javakhishvili Tbilisi State University, Faculty of Law, Tbilisi, p. 36.



ty, understanding, that this is a confidential process and that he/she can not make any binding decisions; While in litigation, the parties have to act before the judge, and this can create some discomfort. They analyze the circumstance, that in case of disagreement, the same judge who will have information about their positions, in case of disagreement, will the person authorized to make the decision. The judge's inner faith may be affected, when he or she hears the sincere opinions of the parties about the settlement.<sup>23</sup>

In any case, the process of settlement offers many positive results to the judiciary and the judge. The settlement is the basis for the final settlement of the case and the termination of the proceedings. Settlement saves judge's time, because they only have to deal with the cases, that are not settled.<sup>24</sup>

All the mentioned above, determines the substance of both institutions – the court settlement and the court mediation and their different dynamics. In any case, the future development of both institutions should be considered as a precondition for the satisfaction of the interests of legal entities and the means of the sustainable development of dispute resolution **means**. However, as far as it is recognized, the state and the court are closely linked to economic relations.<sup>25</sup> Therefore, the benefits that can be achieved through court settlement and/or the use of court mediation, will benefit those entities, for which, time and financial resources are important.

## CONCLUSION

In Georgia, too, the existence and strengthening of two unconditionally important legal institutions within the judiciary – court settlement and court mediation – significantly provides opportunities to ensure the achievement of the common goal of law – the protection of the interests of each individual. However, much faster and with less expences, than it can be achieved in a standard civil litigation process. Consequently, in the court system, highlighting their importance completes the unified chain of justice and ensures confidence-building towards the judiciary. Moreover, in the condition, of existing challenges in the judiciary system in Georgia, during the current period.

In the context of the paper, it was considered important to describe the essence of the settlement reached in civil proceedings with the term “court settlement” and not “settlement”, as the institution of settlement may also include an agreement reached by the parties before litigation. So, it has been considered necessary, to distinguish between two circumstances – if the dispute is the subject of a settlement before the court proceedings start and is regulated by the negotiation of the parties; or the case, if the settlement is reached during the civil process. In terms of the terminological perfection of the legislation, it would be appropriate to introduce this term to describe the process, that involves the completion of a dispute after the court proceedings start.

At the same time, in order to ensure the institutionalization of mediation in Georgia, it is necessary, to continue working not only in order to improve the legislation, but also to introduce and implement mediation programs.

The implementation of the presented recommendations, in terms of results, can facilitate the existence of legal institutions, oriented on the interests of citizens; the formation of a legal framework, reflecting the values of the modern legal space and the improvement of the unified chain of justice.

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- 23 Eidenmüller H., 2004. Verhandlungsmanagement durch Mediation, in Henssler L.K (Hrsg) Mediation in der Anwaltspraxis, Deutscher Anwaltverlag, 2. Aufl, p. 62. See also: Khandashvili I., 2018. Judicial and non-judicial forms of alternative dispute resolution on the example of mediation in Georgia, Ivane Javakhishvili Tbilisi State University, Faculty of Law, Tbilisi, p. 35.
- 24 Schiller F., Wall A., 1981. Judicial Settlement Techniques, American Journal of Trial Advocacy, p. 40.
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